# Petition

Office - Supreme Court, U.S.
FILED
OCT 5 1981
ALEXANDER L. STEVAS
CLERK

# 81-662

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

In The Matter Of The Petition

-Of-

EDMUND ALLEN ROSNER,

*Petitioner,*

For Reinstatement To The Bar of The State Of New York Pursuant To Section 90 (5) (b) Of The Judiciary Law Of New York.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

EDMUND ALLEN ROSNER
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11494)

## Question Presented

Whether Due Process requires that an applicant for reinstatement to the New York Bar under New York Judiciary Law, Section 90 (5) (b), be afforded an opportunity to be confronted by and to cross examine witnesses who have supplied information adverse to him, upon which the Departmental Disciplinary Committee relies in opposing his application,* before denial of the application for lack of the requisite character and fitness, where the applicant disputes the witnesses' allegations and has requested a hearing. The Appellate Division by its denial of the petition for reinstatement without affording Petitioner a hearing and without opinion, answered this question in the

*Parties - The parties to the proceeding in the court below were the petitioner, Edmund Allen Rosner, and the Departmental Disciplinary Committee for the First Judicial Department of the State of New York.

negative, in conflict, with prior decisions of this Court, the rule prevailing in all other jurisdictions and established principals of due process.

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The petitioner Edmund Allen Rosner, respectfully prays that a writ of certiorari issue to review the judgement of the New York Supreme Court, Appellate Division, First Judicial Department, issued without opinion, denying his petition he reinstatement to the Bar of the State of New York. A motion for permission to appeal to the New York Court of Appeals having been denied on July 7, 1981.

## Opinion Below

The court below issued no opinions in this proceeding.

## Jurisdiction

The New York Supreme Court, Appellate Division, First Judicial Department, by an order entered on March 19, 1981, denied petitioner's application for reinstatement to the New York Bar. On May 14, 1981, that court denied a motion for an order granting reargument or in the alternative for permission to appeal

to the New York Court of Appeals. On July 7, 1981, the New York Court of Appeals denied petitioner's motion for permission to appeal to that court. Jurisdiction is invoked under 28 USC §1257(3).

Constitutional Provision, Statutes and Rule involved.

This case implicates the due process clause of the 14th Amendment to the United States Constitution, and New York Judiciary Law §90(5)(b) which provides:

> (b) If such removal or debarment was based upon conviction for a felony as defined in subdivision four of this section, the appellate division shall have power to vacate or modify such order or debarment after a period of seven years provided that such person has not been convicted of a crime during such seven-year period.

N.Y. Judiciary Law §90(4)(a)&(e) provide:

> (a) Any person being an attorney and counsellor-at-law who shall be convicted of a felony as defined in paragraph e of this subdivision, shall upon such conviction, cease to be an attorney and counsellor-at-law or to be competent to practice law as such.

> (e) For purposes of this subdivision, the term felony shall mean any criminal offense classified as a felony under the laws of this state or any criminal offense committed in any other state, district, or territory of the United States and classified as a felony therein which if committed within this state, would constitute a felony in this state.

N.Y. Supreme Court, Appellate Division,

First Department Rule §603.14 provides:

> (a) Any attorney who has been disbarred after hearings or whose name has been stricken from the roll of attorneys pursuant to section 603.11 of this Part may not apply for reinstatement until the expiration of at least seven years from the effective date of the disbarment or removal. Any attorney suspended under the provisions of this Part shall be entitled to apply for reinstatement at such intervals as this court may direct in the order of suspension or in any modification thereof.
>
> (b) Such application may be granted by this court only if the attorney establishes by clear and convincing evidence that he has fully complied with the provisions of the order of disbarment or suspension and only upon a showing of clear and convincing evidence that the attorney possesses the character and general fitness to practice law. This court

may refer such application to the Committee on Character and Fitness in this judicial department or to a referee, justice or judge for a report before granting such application.

(c) This court in its discretion may direct that the necessary expenses incurred in the investigation and processing of an application for reinstatement be paid by the attorney.

(d) An attorney applying for reinstatement shall serve a copy of such application upon the Departmental Disciplinary Committee and such Committee may be heard in opposition to the reinstatement.

Statement of the Case

In this proceeding, commenced by the service and filing of a petition in the Appellate Division of the Supreme Court of the State of New York, First Judicial Department verified September 18th, 1980, Petitioner sought an Order reinstating him to the Bar of the State of New York pursuant to New York Judiciary Law Section 90(5)(b).

On April 5th, 1962, Petitioner was

admitted to the New York Bar. On July 3rd, 1973, an Order was entered by the Appellate Division, First Judicial Department, striking his name from the roll of attorneys based upon a finding that his conviction on March 20th, 1973, of three (3) Counts of Bribery in the United States District Court, for the Southern District of New York resulted in his automatic disbarment under New York Judiciary Law, Section 90(4). See Matter of Rosner, 42 A.D. 2d 113, 345 N.Y.S. 2d 577 (1st Dept. 1973). See Also, United States v. Rosner 485 F. 2d 1213 (2d Cir. 1973), cert. den. 417 U.S. 950 (1974); United States v. Rosner, 516 F.2d 269 (2d Cir. 1975), cert. den. 427 U.S. 911 (1976), reh. den 429 U.S. 988 (1976); United States v. Rosner, 549 F.2d 259 (2d Cir. 1977), cert. den. 434 U.S. 826 (1977).

Petitioner filed a petition for reinstatement more than seven (7) years

after the entry of the disbarment Order during which time he has not been convicted of a crime. As a consequence, he comes within the class of those who may be reinstated to the Bar under New York Judiciary Law Section 90(5)(b).

In support of his petition, he submitted his own affidavit which explained the circumstances surrounding the commission of his crime and showed a sincere acknowledgment of the wrongfulness of his conduct, his contrition and rehabilitation. Since his conviction petitioner has lived a life beyond reproach. For more than five (5) years he has been employed by Matthew Bender & Co. Inc., the legal publisher, as an author and editor. In that position he has earned the respect of his colleagues and superiors who have written letters detailing their experiances with him and supporting his reinstatement. Leaders

of the bar have also written endorsing petitioners character and legal acumen and urging his reinstatement. Among these are a retired New York Supreme Court Justice and Surrogate and four (4) distinguished professors of law, experts in the field of professional responsibility and ethics, one of whom has since been appointed a member of the Departmental Disciplinary Committee in the First Judicial Department in New York.

These papers establish a clear and convincing prima facie case in support of petitioner's current good character and fitness.

A panel of the Departmental Disciplinary Committee reviewed the application and determined to oppose it without according petitioner a hearing. The stated basis for the opposition was twofold:

1) "Petitioner's convictions signify his gross deviation from basic principles of conduct central to attorney's professional standards; and

2) Petitioner's convictions were the culmination of a pattern of conduct evincing unfitness to practice law, not representative of an isolated transgression."

In support of the latter, Committee counsel referred to several instances of alleged misconduct by petitioner years before his disbarment, concerning which hearings have never been held at which petitioner has been accorded the right to cross examine the complainant - accusers.

Petitioner made a motion in the Appellate Division, for Discovery and Inspection with respect to these charges, which was denied by an Order entered on January 27th, 1981. He then filed a

reply, in which he specifically denied the charges of additional misconduct to which he attached other evidence corroborative of some of his denials. He requested that the petition be referred to the Committee on Character and Fitness or to a referee for a hearing to resolve any question as to his acts or the allegations of misconduct and as to his present character and fitness.

The Appellate Division, First Department, by an Order entered on March 19th, 1981, denied the petition for reinstatement without affording petitioner a hearing and without an opinion.

Petitioner applied to the Appellate Division for an Order granting reargument or in the alternative for permission to appeal to the Court of Appeals arguing that by denying his petition without a hearing the Court had overlooked the due process requirements explicated in

Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963). The Departmental Disciplinary Committee opposed and responded that Willner's holding that an applicant for admission to the New York Bar has a due process right to a hearing at which he is to be afforded an opportunity to be confronted by and to cross examine witnesses who supply information adverse to him which he disputes before the denial of his application for lack of the requisite character and fitness, is applicable only to initial applications for admission and does not apply to motions for reinstatement under Judiciary Law Section 90 (5)(b).

The Appellate Division denied this motion in all respects, without opinion, by an Order entered on May 14th, 1981. The New York Court of Appeals denied a

motion for permission to appeal on July 7, 1981.

Reasons For Granting The Writ

DUE PROCESS REQUIRES THAT AN APPLICANT FOR REINSTATEMENT TO THE NEW YORK BAR UNDER JUDICIARY LAW, SECTION 90(5)(b) BE AFFORDED AN OPPORTUNITY TO BE CONFRONTED BY AND TO CROSS EXAMINE WITNESSES WHO SUPPLY INFORMATION ADVERSE TO HIM WHICH HE DISPUTES BEFORE DENIAL OF HIS APPLICATION FOR LACK OF THE REQUISITE CHARACTER AND FITNESS.

In Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963), this Court, explicating its earlier decision in Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1926), ruled that due process requires that before denial of an application for admission to the bar for lack of the requisite character and fitness, an applicant must be afforded an opportunity to be confronted with and to cross examine witnesses who supply information adverse to him, whose reliability or veracity is brought in to question by the applicant.

The Court reversed an Order affirming without opinion the denial of Willner's application for admission to the New York bar notwithstanding the assurance of the Character Committee in that case, that it never bases its final actions on ex parte statements, because the record showed that the Committee did in fact rely on several complaints against the applicant, at least to some extent, in reaching its determinations.

Since this courts decision in Willner, every American jurisdiction has afforded the right of confrontation and cross examination to an applicant for admission to the bar in proceedings to determine his or her fitness to practice law, see, Weiss v. Committee on Character and Fitness, 20 N.Y. 2d 696, 282 N.Y.S. 2d 763 (1967); In Re Brown, 262 S.E.2d 444 (W.Va. 1980); Appeal of Acardi, 436 Pa. 364, 260 A.2d 782 (1970); Application of Dinan, 156 Con.

32, 244 A. 2d 608 (1968); Rask v. Board of Bar Examiners, 75 N.M. 617, 409 P. 2d 256 (1966); In Re Monaghan, 22 A.2d 665 (Vt. 1966); Application of Kellar, 401 P.2d 616 (Nev. 1965); Application of Levine, 97 Ariz.88, 397 P.2d 205 (1965); See also, Tyler v. Vickery, 517 F.2d 1089, 1104 (5th Cir. 1975); Anno. 2 A.L.R. 3d 1266 (Supp.1980); Moity v. Louisiana Bar Association, 239 La. 1081, 121 So.2d 87 (1960); In Re Crum, 103 Or. 296, 204 P. 948 (1922). Other then in New York no distinction is made between initial applications for admission to the bar and petitions for reinstatement, see Bonner v. Disciplinary Bd. of Ala. State Bar, 401 So.2d 734 (Ala. 1981); In Re Brown, 262 S.E.2d 444 (W.V. 1980); Application of Dinan, 156 Conn. 432, 244 A.2d 608 (1968); since in either case the issue is the same, the applicant's charac-

ter and fitness at this time. See, In Re Smith, 270 S.E.2d 768 (W.Va. 1980); In Re Hiss, 368 Mass. 447, 333 N.E.2d 429 (1975); In Re Braverman, 271 Md. 196, 316 A.2d 246 (1974).

From a constitutional perspective no distinction appears tenable. A person who is within the class of those entitled by law to be reinstated to the Bar cannot be rejected upon charges of his unfitness without "such a notice, hearing and opportunity to answer... as would constitute due process", see, Goldsmith v. Board of Tax Appeals, 270 US 117, 123 (1926); Tomanio v. Board of Regents, Etc., 603 F.2d 255, 258-9 (2d Cir. 1979). To come within the class of those who qualify to be reinstated under New York Judiciary Law Section 90 (5)(b), one need only show that his disbarment was based upon a felony as defined in Judiciary Law Section 90 (4) and that he has not been convicted

of a crime during a period of seven (7) years after his disbarment. Petitioners application for reinstatement shows that he satisfies this criteria and in addition makes a convincing showing in support of his current good character and fitness. The Departmental Disciplinary Committee alleges no misconduct by petitioner since his disbarment. Instead, it relies upon his felony conviction arising from acts which occurred in 1971 and on misconduct which allegedly occurred years earlier which petitioner denies and concerning which no hearing has ever been held.

Of course, no presumption of guilt can arise from disputed accusations of misconduct whose reliability or veracity have not been tested at a hearing, see, In Re Crum, 103 Or.296, 204 P. 948,95 (1922).

While under New York law, neither a statute of limitations nor the docrine of laches applies to disciplinary proceedings, Matter of O'Hara, 63 A.D.2d 500, 408 N.Y.S. 2d 70,72 (1st Dept. 1978); Matter of Mix, 249 App. Div. 442, 448,292 N.Y. Supp. 502,509 (4th Dept.) rev'd on other grounds 274 N.Y. 183 (1937); Matter of Simpkins, 169 App. Div. 632, 635, 155 N.Y. Supp. 521, 523 (1st Dept. 1915); Matter of Leonard, 127 App. Div. 493, 111 N.Y. Supp. 905 (1st Dept.), aff'd 193 N.Y. 655 (1908); this is not to say that where charges have become stale through the passage of time and extended periods of inaction the constitution does not preclude further prosection of them, Matter of Kelly, 23 N.Y. 2d 368, 384,296 N.Y.S.2d 937,950 (1968). Such a determination can only be made in most cases after a hearing where it is demonstrated

that the passage of time has precluded the accused from establishing his defense to the charges.

In addition, since the ultimate question is the applicant's current character and fitness and past conduct is not controlling, albeit relevant, see, Application of Kimball, 33 N.Y.2d 586, 347 N.Y.S. 2d 453 (1973) and the Appellate Division under Judiciary Law Section 90 (5)(b) is granted such broad discretion in assessing an applicant's current character and fitness, see also, App. Div. First Dept. Rule §603.14; under the 14th Amendment, U.S. Const., it "must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process," see, Goldsmith v. Board of Tax Appeals, supra; Tomanio v. Board of Regents, supra.

## Conclusion

For the foregoing reasons, this Court should grant the petition for a writ of certiorari and reverse the decision and order of the court below.

Respectfully submitted,

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# APPENDIX

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on January 27, 1981

Present-Hon. Francis T. Murphy, Jr.,
Presiding Justice
Theodore R. Kupferman
Leonard H. Sandler
Vincent A. Lupiano
Max Bloom, Justices

----------x

In the Matter of the Petition of :

Edmund Allen Rosner, :

Petitioner, : M-4768

for reinstatement to the Bar of :
the State of New York pursuant to
Section 90.5.b. of the Judiciary :
Law of New York.

- - - - - - - - - - - - - - - - - - - -x

An order of this Court having been made and entered on July 3, 1973 striking petitioner's name from the roll of attorneys and counselors-at-law in the State of New York,

And petitioner, in connection with

his motion for reinstatement, having moved this Court for an order permitting petitioner to inspect and make copies of certain records, papers and files in the possession, or under the control, of the Departmental Disciplinary Committee for the First Judicial Department, as enumerated in petitioner's moving papers,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in support of said motion, and the papers filed in opposition or in relation thereto; and due deliberation having been had thereon,

It is ordered that said motion be, and the same is hereby denied.

ENTER:

JOSEPH J. LUCCHI, Clerk.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on March 19, 1981.

Present-Hon. Francis T. Murphy, Jr.,
Presiding Justice
Theodore R. Kupferman
Leonard H. Sandler
Vincent A. Lupiano
Max Bloom, Justices

----------x

In the Matter

of

Edmund Allen Rosner,

M-3915

Petitioner,

for reinstatement to the Bar of the State of New York pursuant to Section 90.5.b.of the Judiciary Law of New York.

----------x

An order of this Court having been made and entered on July 3, 1973 striking petitioner's name from the roll of attorneys and counselors-at-law in the State

of New York,

And a further order of this Court having been made and entered on January 27, 1981 denying petitioner's motion to inspect and make copies of certain records papers and files in the possession, or under the control, of the Departmental Disciplinary Committee for the First Judicial Department,

And the petitioner, having presented to this Court on March 2, 1981, a petition seeking an order reinstating him as an attorney and counselor-at-law of the State of New York, and the Departmental Disciplinary Committee for the First Judicial Department having appeared herein by its attorney and interposed an affidavit in opposition to said petition,

Now, upon reading and filing the notice of presentation of petition,

dated September 18, 1980, the petition of Edmund Allen Rosner, petitioner herein, verified September 18, 1980, together with the exhibits thereto, the respective affidavits of petitioner, together with their exhibits, the statement and the memorandum of Saul Friedberg, and the miscellaneous letters and exhibits, all submitted in support of the petition; and the affidavit of Kim D. Ringler, together with the exhibits annexed thereto, in opposition to the petition, and after hearing Saul Friedberg, Esq., for the petition, and Kim D. Ringler, Esq. and Michael A. Gentile, Esq., opposed, and due deliberation having been had thereon, it is

Ordered that the application of petitioner be and the same hereby is denied.

ENTER:

JOSEPH J. LUCCHI, Clerk.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 14, 1981.

Present-Hon. Francis T. Murphy, Jr.,
Presiding Justice,
Theodore R. Kupferman,
Leonard H. Sandler,
Vincent A. Lupiano,
Max Bloom, Justices.

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In the Matter of the petition of

Edmund Allen Rosner,

M-1571

Petitioner,

for reinstatement to the Bar of the State of New York pursuant to Section 90.5.b. of the Judiciary Law of New York.

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The above named petitioner having moved for reargument of or leave to appeal to the Court of Appeals from the order of this Court entered on March 19, 1981,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in

support of said motion, and the papers filed in opposition or in relation thereto; and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is denied.

ENTER:

JOSEPH J. LUCCHI, Clerk.

Mo. No. 721

In the Matter of the Petition of

Edmund Allen Rosner,

Appellant,

For Reinstatement to the Bar of the State of New York Pursuant to Section 90 (5) (b) of The Judiciary Law of New York.

Motion for leave to appeal denied.

DECISION COURT OF APPEALS JUL -7 1981

# Opposition

No. 81-662

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CLERK

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of

EDMUND ALLEN ROSNER,

*Petitioner,*

DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT,

*Respondent.*

**On Petition for Writ of Certiorari to the New York Supreme Court, Appellate Division, First Judicial Department**

## BRIEF FOR RESPONDENT IN OPPOSITION

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*Of Counsel:*
KIM D. RINGLER
Associate Counsel
Departmental Disciplinary Committee

## Questions Presented

I. Whether due process entitles a disbarred attorney to a plenary hearing on the report of the Departmental Disciplinary Committee opposing his petition for reinstatement when the report is disclosed to the disbarred attorney and he has the opportunity to controvert and to comment on it.

II. Whether the Fourteenth Amendment forbids New York courts from establishing procedures to review petitions of attorneys disbarred for criminal acts which differ from those used to review initial applications to the bar.

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No. 81-662

IN THE

# Supreme Court of the United States

October Term, 1981

In the Matter of the Petition

of

EDMUND ALLEN ROSNER,

*Petitioner,*

DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT,

*Respondent.*

**On Petition for Writ of Certiorari to the New York Supreme Court, Appellate Division, First Judicial Department**

## BRIEF FOR RESPONDENT IN OPPOSITION

### Jurisdiction

The Petitioner invokes the jurisdiction of this Court via 28 U.S.C. Section 1257(3).

### Statement of the Case

Petitioner was disbarred on July 3, 1973 upon his conviction after trial of three counts of bribery. Subsequent to his disbarment, Section 90(5)(b) of the Judiciary Law was

enacted giving the court power to reinstate disbarred attorneys. Petitioner filed an application for reinstatement in September, 1980. The Appellate Division of the Supreme Court, First Judicial Department, considered numerous affidavits, character references and arguments submitted on behalf of Petitioner, as well as the recommendation of the Departmental Disciplinary Committee. The Court denied Petitioner's application for reinstatement on March 19, 1981. The Appellate Division denied Petitioner's subsequent motion for reargument and for permission to appeal to the Court of Appeals on May 14, 1981. The New York Court of Appeals, on July 7, 1981, also denied Petitioner permission to appeal.

## ARGUMENT

### I.

### The procedural safeguards afforded to Petitioner satisfied due process.

Attorneys are entitled to due process of law in disciplinary proceedings. *Spevack* v. *Klein*, 385 U.S. 511 (1967). Presumably, disbarred attorneys are also entitled to a quantum of due process in reinstatement proceedings. However, the determination of the particular procedural safeguards which due process requires depends upon the nature of the proceeding, the interests of the government and those of the individual. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Gerzof* v. *Gulotta*, 87 Misc.2d 768, 386 N.Y.S.2d 790, 795 (1976). In light of this principle, the procedures established by the statutory scheme of the Appellate Division of the State of New York satisfy the dictates of due process.

The governmental interest in regulating disbarred attorneys is enormous. The protection of the courts and the public from "official ministrations of persons unfit to practice" is an important function of the court. *In re Echeles*, 430 F.2d 347, 349-50 (7th Cir. 1970). Otherwise, the entire judicial system may be brought into disrepute. *Mildner* v. *Gulotta*, 405 F. Supp. 182, 211 (E.D.N.Y. 1975). This strong public interest overshadows Petitioner's interest.

An individual has no vested right to practice law. *Matter of Isserman*, 345 U.S. 286, 289 (1953). Rather, membership in the bar is a privilege, subject to revocation. Whenever conditions which burden the privilege are broken, the privilege is lost. *Matter of Rouss*, 221 N.Y. 81, 84-85 (1917) (Cardozo, J.). Petitioner forfeited his privilege to practice law by committing felonious criminal acts while he was an attorney. His conviction "evidences the fact that he has failed to meet the most important of those conditions [of bar membership], namely, that he obey the very laws which he has sworn to uphold." *Matter of Mitchell*, 40 N.Y.2d 153, 157 (1976).

Petitioner does not challenge his exclusion from practice. Indeed, since his disbarment was predicated upon a felony conviction, his "constitutional guarantee of due process was safeguarded by his jury trial and appellate review." *Matter of Abrams*, 38 A.D.2d 334, 336, 329 N.Y.S. 2d 369 (1st Dept. 1972). The interest which Petitioner had in his membership in the bar terminated with his disbarment.

The opportunity to petition for reinstatement is a fortuitous development for Petitioner. At the time of his disbarment, no such provision existed. The new provision,

however, conferred no substantive rights upon Petitioner; it merely enabled him to petition. Fairly deprived of his conditional privilege to practice law, Petitioner cannot legitimately claim any entitlement to bar membership. Contrast *Board of Regents* v. *Roth*, 408 U.S. 564 (1972). Even "[c]onceding that an attorney's calling or profession is his property, within the true sense and meaning of the constitution, it is certain that in many cases, at least, he may be excluded from the pursuit of it by the summary action of the court. . . ." *Ex parte Wall*, 107 U.S. 265, 289 (1882).

Extensive procedural safeguards, therefore, did not attach to the petition to be re-entrusted with the privilege of practicing law. Petitioner presented affidavits, character references and argument; he had adequate notice of the damaging information submitted to the court; he exercised his opportunity to explain, deny and criticize the contents of the Disciplinary Committee's recommendation. Denial of the petition, under these circumstances, did not violate the due process clause of the Fourteenth Amendment.

## II.

### The Departmental Disciplinary Committee properly informed the court of additional information relevant to Petitioner's character and fitness to practice law.

Pursuant to Section 603.14(d) of the applicable court rules, the Departmental Disciplinary Committee opposed the petition for reinstatement and stressed the misconduct underlying Petitioner's disbarment. The Committee also presented additional material relevant to the issue of Pe-

tioner's character and fitness to practice law. The material included a prior indictment and numerous suggestions of impropriety from a judge, an adversary and clients. There is no suggestion that the Committee misrepresented the nature of its information.

The recommendation of the Departmental Disciplinary Committee can be analogized to a pre-sentence report in a criminal setting. In New York, the Department of Probation submits to the court a pre-sentence memorandum concerning any matter the agency deems relevant to the question of sentence. Criminal Procedure Law of the State of New York Section 390.30(1) and (3). Likewise, this Honorable Court has held that possession of the fullest information possible concerning the defendant's life and characteristics is critical to a sentencing judge. *Williams* v. *New York*, 337 U.S. 241, 247 (1949). *See also* 18 U.S.C. Section 3577.

In the Petitioner's case, the Departmental Disciplinary Committee supplied the court with its bases for opposing reinstatement. The Petitioner denied knowledge of some matters and denied commission of some acts. He also attacked the reliability of the information. The court which received the petition, the recommendation and the response to the recommendation determined the probative weight due each item submitted. The court decided no further investigation was warranted and denied Petitioner's request for a hearing.

The contents of the Departmental Disciplinary Committee recommendation would be permissible in a criminal sentencing setting. *A fortiori*, the report offends no constitutional requirement in a post-conviction, post-disbarment disciplinary proceeding.

## III.

**New York courts may constitutionally use procedures to review the petitions of disbarred attorneys which differ from those used to review initial applications to the bar.**

Petitioner's argument that he is entitled to a full hearing because an unsuccessful initial applicant to the bar is entitled to a hearing contains at least two major flaws.

First, *Willner* v. *Committee on Character*, 373 U.S. 96 (1963), relied upon heavily by Petitioner and involving an initial applicant's attempt to gain admission to the bar, suggests that due process requirements do not automatically require a plenary hearing. Three members of the Court opined as follows:

> in all cases in which admission to the bar is to be denied on the basis of character, the applicant, at some stage of the proceedings prior to such denial, must be adequately informed of the nature of the evidence against him and be accorded an adequate opportunity to rebut his evidence. . . . this does *not* mean that in every case confrontation and cross-examination are automatically required.

*Id.* at 107 (1963) (concurring opinion) (emphasis added). The Respondent's recommendation was served upon Petitioner. Petitioner had every opportunity to rebut the Committee's recommendation, thus satisfying the rule set forth in *Willner*.

The second flaw in Petitioner's argument is that Petitioner stands on a different footing from a layperson applying for initial admission to the bar. Unlike Petitioner, Willner had neither committed a federal crime, violated a

sworn duty, dishonored his profession, nor undermined public distrust of the courts and the bar. Furthermore, the view that a petition for reinstatement should be treated as an original application for admission to the bar is disfavored. *In re Stump*, 272 Ky. 593, 114 S.W.2d 1094, 1096 (1938).

Petitioner's reliance upon *Willner, supra*, is unfounded. Unlike an initial applicant to the bar, Petitioner was examined and admitted. He then breached his oath as an officer of the court by committing felonies, and his license was revoked. Petitioner does not belong to Willner's class. Accordingly, the different type of hearing afforded to each class of applicants is consistent with due process and equal protection. *See Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955).

## Conclusion

For the reasons stated above, Respondent respectfully requests that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

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# Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

No. 81-662

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

EDMUND ALLEN ROSNER,

*Petitioner,*

vs.

DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT OF THE STATE OF NEW YORK,

*Respondent.*

On Petition for Writ of Certiorari
to the New York Supreme Court,
Appellate Division,
First Judicial Department

## REPLY BRIEF FOR PETITIONER

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On Petition for Writ of Certiorari
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## REPLY BRIEF FOR PETITIONER

### RESPONDENT'S OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI IS BASED ON A MISUNDERSTANDING OF APPLICABLE CASES AND PRINCIPLES.

Respondent, in opposing this petition for a writ of certiorari, suggests that we have misconstrued Willner

v. Committee on Character and Fitness, 373 U.S. 96 (1963), quoting out of context from the concurring opinion as follows:

> "in all cases in which admission to the bar is to be denied on the basis of character, the applicant, at some stage of the proceedings prior to such denial, must be adequately informed of the nature of the evidence against him and be accorded an adequate opportunity to rebut his evidence...this does not mean that in every case confrontation and cross-examination are automatically required."

Id. at 107, (concurring op.)(emphasis added); (Resp. Br. 6).

In making this argument, Respondent overlooks the explication of this statement. The opinion goes on to say:

> "The circumstances will determine the necessary limits and incidents implicit in the concept of a "fair" hearing. Thus, for example, when the derogatory matter appears from information supplied or confirmed by the applicant himself, or is of an undisputed documentary character disclosed to the applicant, and it is plain and uncontradicted

> that the committee's recommendation against admission is predicated thereon and reasonably supported thereby, then neither the committee's informal procedures, its ultimate recommendations, nor a court ruling sustaining the committee's conclusion may be properly challenged on due process grounds, provided the applicant has been informed of the factual basis of the conclusion and has been afforded an adequate opportunity to reply or explain. Of course, if the denial depends upon information supplied by a particular person whose reliability or veracity is brought into question by the applicant, confrontation and the right of cross-examination should be afforded." Id. at 107-108, (concurring op.)(emphasis added).

Petitioner acknowledges the misconduct underlying his criminal conviction and subsequent automatic disbarment. However, he denies the charges underlying a prior indictment, which has been dismissed, see, United States v. DiStefano, 464 F.2d 845 (2d Cir. 1972); United States v. DiStefano, 347 F.Supp. 442 (S.D.N.Y. 1972), and the other allegations of impropriety upon which the committee based

its opposition to his reinstatement. He sought discovery and inspection concerning these derogatory allegations and requested a hearing with the right to cross-examine their source, all of which has been denied, in violation, we submit, of the due process requirements set forth in Willner.

That this is an application for reinstatement, by a lawyer convicted of a felony and automatically disbarred under New York law, should not change the result. The Legislature amended the New York Judiciary Law in 1978 and § 90(5)(b) was enacted to provide lawyers who had been automatically disbarred as a result of a felony conviction with an opportunity to be reinstated to the bar. Doubtless, this new statutory scheme must be implemented so as to satisfy the requirements of procedural due process, see, Willner v. Committee on Character and Fitness,

supra; Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1926): Tomanio v. Board of Regents, 603 F.2d 255 (2d Cir. 1979). This is so, irrespective of whether the practice of law is a right or a privilege. This court has often noted that a person who has the necessary qualifications cannot be prevented from practicing law except for valid reasons. Admission to the practice, like the right to engage in other occupations, cannot be treated as a matter of grace or favor. Willner v. Committee on Character and Fitness, supra, at 102; Schware v. Board of Bar Examiners, 353 U.S. 232, 238-239 (1957); Ex Parte Garland, (U.S.) 4 Wall 333, 379 (1867). Other courts have said that "the practice of law rises above that of a mere privilege. For those who have the necessary qualifications it is a right." Application of Levine, 97 Ariz. 88, 397 P.2d 205 (1965); se also, In Re Monaghan,

22 A.2d 665, 675 (Vt. 1966); Application of Kellar, 401 P.2d 616, 617 (Nev. 1965); compare, (Resp. Br. 2-4).

Petitioner's prior conviction does not justify watering down established principles of due process, in this case, because that conviction bears no reasonable relationship to those principles. If the committee's opposition to petitioner's reinstatement was based solely on the conduct underlying his conviction, perhaps petitioner's right to confrontation with cross-examination would have been satisfied by his prior trial and his admissions. Although, even this is not free from doubt, since the purpose of a criminal trial and the issues litigated there differ from the issues to be resolved on a motion for reinstatement made not less than seven years later, see, Mancusi v. Stubbs, 408 U.S. 204 (1972); Barber v. Page, 390 U.S. 719 (1968). But,

where as here, respondent opposes petitioner's reinstatement, in part, on the basis on charges different from those underlying his prior conviction and petitioner denies these charges and requests a hearing with the right to cross-examine their source, in order to refute them, his prior felony conviction does not provide a rational basis for refusing that request. Since this court's decision in Willner, every state court which has addressed the issue, outside of New York, has rejected the distinction which respondent seeks to draw between initial applications for admission to the bar and petitions for reinstatement by lawyers who have been disbarred because of felony convictions, see, Bonner v. Disciplinary Bd. Of Ala. State Bar, 401 So.2d 734 (Ala. 1981); In Re Smith, 270 S.E.2d 768 (W.Va. 1980); In Re Brown, 262 S.E.2d 444 (W.Va. 1980); Application of Dinan, 156

Conn. 432, 244 A.2d 608 (1968).

The right of a court in a criminal case to receive a pre-sentence report and Williams v. New York, 337 U.S. 241 (1949), are not incompatable with our position, contrary to respondent's suggestion, (Resp. Br. 4-5).

Since the determination of the procedural safeguards which due process requires depends upon the nature of the proceeding and the competing interests of the government and the individual, Goldberg v. Kelly, 397 U.S. 254 (1970), (Resp. Br. 2), it seems that the obvious difference in the nature and purpose of a criminal sentencing proceeding and the law enforcement interest in protecting the confidentiality of informants in a given case, is so markedly different from the interest involved in a proceeding for reinstatement to the bar as to justify a difference in the procedural safeguards

which due process may require.

In any event, Williams v. New York, supra, should not be overread. In Williams, Justice Black noted:

> "The accuracy of the statements made by the judge as to appellant's background and past practices was not challenged by appellant or his counsel, nor was the judge asked to disregard any of them or to afford appellant a chance to refute or discredit any of them by cross-examination or otherwise." Id., at 244.

Compare, Gardner v. Florida, 430 U.S. 349 (1977); See also, United States v. Tucker, 404 U.S. 443 (1972); Townsend v. Burke, 334 U.S. 736 (1948).

To minimize the possibility that incorrect information will be considered by a sentencing judge, a defendant in a federal court is now given the right under Fed. R. Crim. P. 32(c)(3)(A), to review the contents of the pre-sentence report, "to comment thereon and, at the discretion of the court, to introduce testimony

or other information relating to any alleged factual inaccuracy" that it contains. While the Federal Rules, of course, are inapplicable to state sentencing proceedings, this Court has suggested that a state prisoner may have a right arising under the Constitution, comparable to that set forth in the Federal Rules, see, Gardner v. Florida, supra. Other courts have ruled that where a defendant challenges the truthfulness of statements in a pre-sentence report, the government may be required to substantiate the challenged information. United States v. Fatico, 579 F.2d 707 (2d Cir.), on remand, 458 F.Supp. 388 (E.D.N.Y.) aff'd 603 F.2d 1053 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980); Hollis v. Smith, 571 F.2d 685 (2d Cir. 1978); United States v. Bass, 535 F.2d 110 (D.C. Cir. 1976); United States v. Needles, 472 F.2d 652 (2d Cir. 1973);

United States v. Weston, 448 F.2d 626 (9th Cir. 1971), cert. denied, 404 U.S. 1061 (1972).

In contrast, in this case, petitioner's challenge to the reliability and veracity of the allegations of additional misconduct which he bolstered with corroborative evidence, did not cause the Appellate Division to require the Departmental Disciplinary Committee to substantiate the disputed information and his motion for discovery and inspection and his request for a hearing with an opportunity to cross-examine his accusers has all been denied.

Unless this petition is granted and the decision and order of the court below is reversed, Willner and its promise of procedural due process will have been rendered nugatory for petitioner and others in New York who now qualify for reinstatement to the bar.

## CONCLUSION

This Court should grant the petition for a writ of certiorari and reverse the decision and order of the court below.

Respectfully submitted,

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